

Rule 2, Ariz. R. Crim. P.

CHARGING – The prosecutor has discretion as to whether to file charges, to choose what charges to file, and whether to continue with prosecution once charges are filedRevised 12/2009

The prosecutor, as part of the executive branch of government, has broad discretion in enforcing criminal laws, including the discretion to decide what, if any, charges to file against a defendant and the discretion whether to proceed or not once the action has begun. *State v. Larson*, 159 Ariz. 14, 16, 764 P.2d 749, 751 (App. 1988).

For instance, a prosecutor, as a member of the executive department, ‘is properly vested with both the power ... and the discretion to proceed to trial once a criminal action has been filed.” *State v. Ramsey*, 171 Ariz. 409, 413, 831 P.2d 408, 412 (App. 1992). And, “the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers.” *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976).

State v. Superior Court, 180 Ariz. 384, 387, 884 P.2d 270, 273 (App. 1994) [ellipsis in original]. “The fact that a prosecutor has discretion whether or not to bring a charge does not, in the absence of an abuse of that discretion, render the application of any criminal statute arbitrary or discriminatory.” *Hirschfeld v. Superior Court*, 184 Ariz. 208, 215, 908 P.2d 22, 29 (App. 1995), *quoting State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110, 1112 (1976). “Unquestionably, the prosecutor has the power to decide what charges to file against a person accused of a crime, and whether to terminate or divert the prosecution of a case after its commencement, unless the legislature has restricted that authority.” *Andrews v. Willrich*, 200 Ariz. 533, 537, ¶ 15, 29 P.3d 880, 884 (App. 2001) [citation omitted]. “[T]he prosecutor has sole discretion to determine whether to continue prosecution.” *City of Phoenix v. Yarnell*, 184 Ariz. 310, 317, 909 P.2d 377, 384 (1995); A.R.S. § 11-532(A)(1).

The prosecutor has discretion to designate class 6 felonies as misdemeanors, either at charging or “before or during the preliminary hearing.” A.R.S. § 13-604(B)(3); *see Amancio v. Forster*, 196 Ariz. 95, 98, ¶ 16, 993 P.2d 1059, 1062 (App. 1999). The prosecutor also has discretion to amend the charges downward, for example, to amend a felony charge to allege a misdemeanor instead. *See, e.g., State v. Quintana*, 195 Ariz. 325, 327, ¶ 9, 987 P.2d 811, 813 (App. 1999).

The prosecutor has discretion whether to admit a defendant into a diversion program. *Cranmer v. State*, 204 Ariz. 299, 302, ¶ 10, 63 P.3d 1036, 1039 (App. 2003), *quoting State v. Brown*, 121 Ariz. 125, 126, 588 P.2d 867, 868 (App. 1978). Similarly, in juvenile cases, once the prosecutor has received a juvenile referral, the prosecutor has the “sole discretion to divert or defer the prosecution to a community based alternative program or to a diversion program.” *David G. v. Pollard ex rel. County of Pima*, 207 Ariz. 308, 310, ¶ 11, 86 P.3d 364, 366 (2004). In addition, in certain cases, the prosecutor has discretion whether to charge juveniles with crimes as adults or with delinquent acts in juvenile court. *Andrews v. Willrich*, 200 Ariz. 533, 537-538, ¶ 16, 29 P.3d 880, 884-885 (App. 2001); *In re Timothy M.*, 197 Ariz. 394, 399, ¶ 23, 4 P.3d 449, 454 (App. 2000).

Even in capital cases, the prosecutor has discretion in choosing which, if any, offenses to charge and prosecute. *State v. Atwood*, 171 Ariz. 576, 625, 832 P.2d 593, 642 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992). “Traditionally, the prosecutor makes the initial choice whether capital punishment is appropriate and whether to seek it. It would be inappropriate for this court to encroach

on reasonable prosecutorial discretion, absent a clear indication of misconduct.” *State v. White*, 194 Ariz. 344, 354, ¶ 42, 982 P.2d 819, 829 (1999). Defendants have repeatedly argued that giving the prosecutor discretion whether to seek the death penalty violates the Eighth Amendment, but both the Arizona and United States Supreme Courts have rejected that argument. *State v. Sharp*, 193 Ariz. 414, 426, ¶ 49, 973 P.2d 1171, 1183 (1999), *citing Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992).

Choosing which offense to charge and prosecute is within the discretion of the prosecutor. When conduct can be prosecuted under two or more statutes, the prosecutor has the discretion to determine which statute to apply. *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992). “Absent a violation of due process, the prosecutor has broad discretion in deciding whether to file charges against one accused of a crime. *E.g.*, *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992).” *Bird v. State*, 184 Ariz. 198, 204, 908 P.2d 12, 18 (App. 1995). The fact that a prosecutor has discretion whether or not to bring a charge does not, in the absence of an abuse of that discretion, render the application of any criminal statute arbitrary or discriminatory. *Hirschfeld v. Superior Court*, 184 Ariz. 208, 215, 908 P.2d 22, 29 (App. 1995).

The prosecution may initiate and try charges even when the victim does not want to pursue the charges. “The prosecutor has broad discretion to conduct prosecutions for public offenses. *See generally State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976). The state has an interest in enforcing the law regardless of the wishes of the victim, and

this is particularly true as to crimes against children and family members.” *State v. Granados*, 172 Ariz. 405, 408, 837 P.2d 1140, 1143 (App. 1991).

Rule 13.5, Ariz. R. Crim. P., gives the prosecutor discretion to amend a charging document to add allegations of prior convictions “or other non-capital sentencing allegations that must be found by a jury” within the time limits prescribed by Rule 16.1, but does not allow adding substantive charges unless the defendant consents to the amendment. *State v. Cons*, 208 Ariz. 409, 411, ¶ 4, 94 P.3d 609, 611 (App. 2004).